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No. 355

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

ON APPEAL FROM THE SUPREME COURT OF INDIANA

INTERNATIONAL HARVESTER COMPANY
AND
INTERNATIONAL HARVESTER COMPANY
OF AMERICA,
Appellants,

v.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON, AND FRANK G. THOMPSON, AS MEMBERS OF AND CONSTITUTING THE BOARD OF DEPARTMENT OF TREASURY,
Appellees.

APPELLEES' BRIEF

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LIST OF AUTHORITIES CITED

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APPELLEES' BRIEF

The case below is not yet officially reported in the Indiana Supreme Court Reports, but may be found reported in 47 N. E. (2d) at page 150.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

This is an appeal from the Supreme Court of Indiana in which appellants invoked the jurisdiction of this court under Section 237 (a) of the Judicial Code (28 U. S. C. A. 344a). Appellants contend that there is here drawn in question the validity of the Gross Income Tax Law of the State of Indiana on the ground of its being repugnant to the Constitution of the United States and that the decision of the Supreme Court of Indiana was in favor of its validity. The appellees filed herein a statement of matters and grounds making against the jurisdiction of this court and a motion to dismiss this appeal or affirm the decision of the state court upon the two grounds that decision of the state court was as to the application of the Act and that no substantial federal question is involved.

CONCISE STATEMENT OF THE CASE

Nature of the Action

This is a statutory action for a refund of Indiana Gross Income tax alleged to have been improperly collected. Such actions are authorized by Section 14 of the Indiana Gross Income Tax Act. No question is raised as to the procedure followed for the assessment of the tax or as to the proceedings pre-requisite to the filing of this action.

Appellants' Intra-Corporate Organization

Appellants' corporate reorganizations (R. 23-25) are ignored and Appellants are treated as a single corporate entity. (Appellants' Brief, p. 3.) It is a non-resident corporation (R. 23).

Appellant is engaged in the manufacture of a large line of farm implements, machinery and vehicles (R. pp. 25, 76). These are manufactured by appellants in several factories located in various states, two of which are in Indiana (R. 25), namely, a motor truck factory at Fort Wayne and a factory at Richmond for seeding machines and light tillage implements.

For the purpose of distributing the products so manufactured, appellants maintain a nation-wide organization, as follows:

1. *General Transfer Warehouses.* These are intermediate supply depots, located in the mid-western farm belt, maintaining general stocks of goods received from the factories and held for ready shipment during the selling season. They engaged in no selling activity. (R. 26.)

2. *Selling Branches.* These branches sell at wholesale to dealers and at retail to consumers. (R. 26.) They are of two types, "general line" and "motor truck," which are in some instances combined. (R. 25-26.)

General Line. These branches handle all goods except motor trucks. (R. 25.) Each maintains a warehouse (R. 75) and a stock of such goods as are in general use in its territory (R. 73), such stock being sufficient to supply about one-half of all its sales (R. 89). The selling branch negotiates and accepts on behalf of the seller all sales and sales contracts and collects the proceeds and is an independent unit for that purpose. (R. 33.) Each branch has a definitely assigned territory, has full control of and gets full credit for, all sales within that territory. (R. 68.) The location of and the territory assigned to, a branch house are determined by economic factors, the territory being a natural trade area which may or may not transcend

state boundaries and the location being the principal market place in that area. (R. 59-61.) The territories of the Fort Wayne, Terre Haute, Evansville and Indianapolis branches (being the only branches located in Indiana) included areas in the surrounding states, while the territories of the Kankakee, Illinois, Louisville, Kentucky, and Cincinnati, Ohio, branches included areas in Indiana not served by the Indiana branches. (R. 93.)

Motor Truck Branches. It does not appear from the record that the organization of the Motor Truck Branches differs from that of the General Line Branches except in respect to the goods sold and some variations of territory.

3. *McCormick-Deering Stores.* These are retail stores operated by a subsidiary company in locations where the company has been unable to secure adequate dealer representation. These stores operate under the supervision of the branch in whose territory it is located and the branch is required to approve all retail credit granted by them. There are several of these stores in Indiana. (R. 26, 55-56, 75.)

4. *The Home Office.* This is located at Chicago, Illinois, and exercises general executive and supervisory functions. (R. 23, 56-57.)

Distribution of Appellants' Products

Appellants' factories maintain no storage facilities, but upon manufacture ship the goods to the transfer houses, selling branches or dealers (R. 63), or deliver at the factory to fill specific orders (R. 67).

The transfer houses ship the goods as ordered either to the branch house, dealer or consumer.

The branch houses ship or deliver to either dealers or consumers to fill specific orders.

Appellants' Sales Practices

Appellants are primarily engaged in selling upon credit with title reserved in it until ultimate sale to and payment in full by the consumer. (R. 34, 34A.)

Wholesale sales are handled by the branch house which obtains from the dealer an annual contract for his estimated requirements (R. 32, 34-37), and takes his subsequent orders for additional goods (R. 32). These contracts and orders are subject to acceptance by the branch. (R. 32.) The place from which goods are shipped or at which they are delivered is ordinarily determined with regard to the speed with which they are desired and the cost of shipment. (R. 78-79, 81-91.)

Types of Sales Herein Involved

This cause involves *three* (3) types of sales, each of which the Supreme Court of Indiana held to be taxable. Appellants correctly describe the sales in question with the exception that they stress the fact that in Class C the orders were accepted at and payments made to appellants out of state branches but do not mention that in Classes D and E such acceptances and payments were made at appellants' in-state branches.

SUMMARY OF ARGUMENT

The tax here in question was assessed under that portion of Section 2 of the Gross Income Tax Law of Indiana imposing a tax *against non-residents* measured by the gross receipts of their intrastate activities. Both the state and federal courts have distinguished such tax against non-residents from that tax levied against residents measured by all of their receipts both interstate and intrastate.

I

CLASS D SALES

In this class of sales the contract consummated in Indiana was fully performed by delivery of goods in Indiana which had been manufactured in Indiana. The buyer lived outside Indiana and intended to convey the goods outside the state.

The goods were still a part of the common mass of property within the state and were subject to property taxation there and were subject to taxation upon the sale, that being the exercise of a right of property.

The fact that the purchaser intended to remove the property from the state after purchase does not convert the transaction into an interstate transaction and the tax here levied is valid under the direct authority of *Department of Treasury v. Wood Preserving Corporation* (1941), 313 U. S. 62.

II

CLASS C SALES

These are sales negotiated by appellants' out-of-state branches where the goods never moved in interstate com-

merce but were sold and delivered in Indiana to Indiana residents.

The performance of the contract of sale not being within the protection of the commerce clause, the formation of the contract is not within its protection.

III

CLASS E SALES

These are sales by a branch located within Indiana to a resident of Indiana where delivery was accomplished by interstate shipment of the goods into Indiana. Appellants' contention is that the contract of sale required such shipment and that therefore the sales were protected by the commerce clause. This attempted distinction has been specifically denied by this court and under the clear authorities of this court the sales are taxable.

IV

DUE PROCESS CLAUSE

The levy of this tax upon the sales here in question does not contravene the due process clause for the reason that the state was in each instance taxing intrastate exercise of rights of property and the doing of an intrastate business.

CONCLUSION

All receipts here involved were from sales made upon the Indiana market. Any burden of the tax would be upon sales on the Indiana market and would not be a burden upon interstate commerce.

ARGUMENT

The tax here in question was assessed under the Gross Income Tax Act of 1933. Section 2 of this act designated the taxable event upon which the excise is levied:

> "There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

The Indiana Supreme Court has repeatedly recognized a distinction in this act between residents and non-residents. In the first case to arise under it the court held:

> "We conclude that the tax in question is an excise, levied upon those domiciled within the state or who derive income from sources within the state, upon the privilege of domicile or the privilege of transacting business within the state, and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justi-

fies a tax upon the basis of the right to receive income within or transact business under the protection of the state."

> *Miles v. Dept. of Treasury* (1935), 209 Ind. 172, 188, 199 N. E. 372, 378, 101 A. L. R. 1359.

In *Indiana Creosoting Co. v. McNutt* (1936), 210 Ind. 656, 663, 5 N. E. (2d) 310, 313, the court again characterized the tax as an excise tax measured by gross income and reaffirmed the above quoted language in the *Miles* case.

Practically the same language was used by the court in *Storen v. J. D. Adams Mfg. Co.* (1937), 212 Ind. 343, 7 N. E. (2d) 941, 946.

This distinction drawn by the Indiana Supreme Court is strongly emphasized by a comparison of *Dept. of Treasury v. Allied Mills* (1942), 220 Ind. 340, 42 N. E. (2d) 34, aff'd 63 S. Ct. 666, and the decision of that court as to Class A sales in the case at bar (42 N. E. (2d) 150). In the former the taxpayer was an Indiana corporation; in the latter, a foreign corporation. In each, goods manufactured extra-state were sold through an extra-state sales branch to residents of Indiana, delivery being made by common carrier. Although the Indiana corporation had been held taxable in the *Allied Mills* case, the foreign corporation was held non-taxable in the present case, the court holding that the Class A receipts were not derived from sources within Indiana.

The clear import of these decisions is that although residents of Indiana are taxable upon all receipts from all transactions, non-residents *engaged in business in Indiana,* are taxable only upon their receipts from sources within

the state. (In each instance transactions which the Federal constitution prohibits the state from taxing are expressly excepted. *Section 6a, Gross Income Tax Act,* Appendix A, Appellant's Brief, p. 39.)

As to the non-resident here involved, the tax is conditioned upon its engaging in business in Indiana and deriving gross income from sources within the state. This construction of the statute under consideration is controlling upon this court: *J. Bacon & Sons v. Martin* (1939), 305 U. S. 380.

This construction of the act has also been approved and stated by this court. In *Wood Preserving Co. v. Dept. of Treasury* (1941), 313 U. S. 62, the Circuit Court of Appeals stated the contentions of the parties as follows (114 Fed. (2d) 922):

> "It is contended by the plaintiff that the event was the receipt of gross income which occurred in Pennsylvania. If this position is sound, it is evident—in fact, not disputed—that the State of Indiana was without power to levy and collect the tax. It is defendants' contention as stated in their brief, that 'the thing which the Statute authorizes as the taxable event, the thing that was taxed, is the transaction which occurs in Indiana involved in one of two things, either doing business within the state or deriving income from a source within the State.' Under this theory, the gross income received in Pennsylvania is merely the measure for the tax."

Upon these contentions, the Circuit Court held for the plaintiff. The cause was appealed to this court where the petitioner renewed its contentions on pages 15-23 of its brief and this court reversed (313 U. S. 62), saying:

"The court below has held that under this statute the thing taxed was 'the receipt of gross income' and as the income in question was received by respondent in Pennsylvania, it was beyond the jurisdiction of Indiana; that, if the contrary theory of the taxing officials was sound, still the tax was invalid because no method was provided for allocating the tax to the income derived from that part of the business transacted in Indiana; and, further, that the transactions in question 'were had in interstate commerce,' that the tax discriminated against that commerce and for that reason was void.

"We think that the court was in error in each of these conclusions.

"As to the first point, the court relied upon our decision in *Adams Manufacturing Co. v. Storen*, 304 U. S. 307. That was a case under the same taxing act of Indiana, but there the tax was applied to gross receipts derived by an Indiana corporation from sales in other States of goods manufactured in Indiana. We observed that the tax was not an excise for the privilege of domicile 'Since it is levied upon the gross income of non-residents from sources within the state.' The point of that decision was that 'the tax is what it purports to be,—a tax upon gross receipts from commerce,' and that the tax was there laid upon receipts from sales to customers in other States and abroad which constituted interstate and foreign commerce. Id., pp. 310, 311.

"The present question is as to the validity of the tax upon receipts 'derived from sources within the State,'* that is, under Section 2 of the Act, from activities which petitioners insist were intrastate. * * *"

* To this statement the court cites *Miles v. Department of Treasury*, 209 Ind. 172, 188, and *Indiana Creosoting Co. v. McNutt*, 210 Ind. 656, 664, each of which is herein discussed. (P. 8, *supra*.)

More recently, in *Holland Furnace Co. v. Department of Treasury* (1943), 133 Fed. (2d) 212, the Circuit Court of Appeals on authority of *Miles v. Department of Treasury*, 209 Ind. 172 (*cf. supra*, p. 8), said:

> "Section 2 of the Act provides for a tax upon gross income 'derived from sources within the State of Indiana' of all non-resident persons or corporations. The tax is general, non-discriminatory, operating upon all classes alike, * * *."

This court denied certiorari October 11, 1943.

It must therefore be acknowledged that the settled construction of the Indiana Gross Income Tax Act of 1933 is that while the tax as to residents is conditioned upon the receipt of all income which Indiana is not prohibited from taxing by the Federal Constitution, non-residents are taxed only as they are "engaged in business in this state, or who derive gross income from sources within this state." The tax so levied against local activities is measured by "the gross income derived from sources in Indiana." A non-resident's liability for tax is limited to gross income received from Indiana sources and is conditioned upon (1) his being engaged in business in Indiana or (2) receiving such gross income from sources in Indiana. Activities by a non-resident within the State will not subject him to tax if such activities are merely incidental to a business conducted in another state. In the case at bar (47 N. E. (2d) 150, 152) the Indiana Supreme Court says:

> "The appellants would have us construe the statute as exempting only income derived *entirely from activities* outside of Indiana. This would distort the clear import of the language employed and violate the rule stated above."

The Class A sales of Appellants which the Indiana Supreme Court held were non-taxable were described by that court as (47 N. E. (2d) 150, 151):

> "Sales by branches located outside Indiana to dealers and users located in Indiana. These sales were made on orders solicited in Indiana by representatives of out-of-state branches. The orders were accepted by the outside state branch offices and the purchase money paid to them. Without directions from the purchasers, the goods were shipped to them in Indiana from branches, warehouses or factories located outside Indiana."

It is apparent by this decision concerning Class A sales that Indiana does not attempt to tax sales attributable to Petitioner's out-of-state business even though some activities incidental to such out-of-state business were carried on in Indiana (for example: the solicitation of orders by out-of-state branches in Class A sales). Conversely, Indiana does tax businesses conducted in Indiana by non-residents even though some of the activities incidental to such business are carried on in other states. Cf. *Holland Furnace Co. v. Department of Treasury* (1943), 133 Fed. (2d) 212.

Since the tax against residents upon their entire Gross income from all sources (including interstate commerce) differs materially from the tax against non-residents upon their intra-state activities alone, the cases involving the former (*J. D. Adams Manufacturing Co. v. Storen* (1937), 304 U. S. 307; *Department of Treasury v. Allied Mills* (1942), 220 Ind. 340, aff'd 63 S. Ct. 666) are inapplicable to the commerce clause questions presented in this case.

In the case at bar three types of transactions are in question. They are referred to as Classes C, D and E.

Class C. Petitioner was engaged in the business of manufacturing in Indiana and made unconditional delivery of the manufactured product to the purchaser at its plant in Indiana. The incidental out-of-state activity was that the contracts of sale were negotiated by an out-of-state branch sales office where payment was made.

Class D differs from Class C only in that the purchaser was a non-resident and at the time of delivery intended to and did transport the goods to their state of residence.

Class E. Petitioner maintained a branch office in Indiana where sales were negotiated with Indiana residents. The out-of-state activity arose by reason of the fact that the contract of sale required delivery by common carrier from without the state.

Thus, in each instance Petitioner maintained in Indiana an establishment at which it conducted a substantial business. Indiana seeks to tax such local business establishments and measures its tax by the gross receipts derived from Indiana sources. Does the Federal Constitution prohibit such a tax?

I

THE TAX ON CLASS D SALES IS NOT AN UNCONSTITUTIONAL BURDEN UPON INTERSTATE COMMERCE

In this class of sales the tax was laid upon the activities of the seller in transactions wherein a contract of sale, consummated by seller's acceptance at its branch in Indiana, was fully performed by such seller by delivery of the goods in Indiana where such goods were manufactured. The non-resident buyer (against whom no tax was levied)

intended to and did remove the goods from the state immediately following such delivery.

All of the activities of the seller (including manufacture of the goods) occurred in Indiana, except the solicitation of the order. All of the activities of the buyer, except the acceptance of delivery, occurred outside Indiana. The tax is levied against the seller.

At the time when the sale was made and the goods were delivered, the goods had never been without the State of Indiana where they were manufactured. They were still a part of the common mass of property within the State of Indiana and were subject to property taxation there. *Minnesota v. Blasius* (1933), 290 U. S. 1; *Hope Gas Co. v. Hall* (1926), 274 U. S. 284 (tax measured by gross receipts); *Heisler v. Thomas Colliery Co.* (1922), 260 U. S. 245; *Coe v. Errol* (1885), 116 U. S. 517.

In relation to the commerce clause there is no distinction between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements. *Nashville, C. & St. L. Ry. v. Wallace* (1932), 288 U. S. 249, 267-8; *Henneford v. Silas Mason Co.* (1936), 300 U. S. 577, 582; *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 52. Thus, appellants' activities in making these sales were essentially intrastate and taxable. Our previous discussion has shown that the tax was conditioned upon these intrastate activities. It therefore clearly follows that the decision below was correct.

In strict accord with this reasoning is the case of *Department of Treasury v. Wood Preserving Corp.* (1941), 313 U. S. 62. In that case this same tax was levied against

sales of ties produced in Indiana, where the sales were made pursuant to the terms of a contract negotiated and entered into outside the state, which contract required that the purchasing railroad company transport the ties to an Ohio plant for processing. The court there said (p. 68):

> "These were local transactions—sales and deliveries of particular ties by respondent to the Railroad Company in Indiana. The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment. The contract providing for that treatment called for treatment of ties to be delivered by the Railroad Company at the Ohio plant, and the ties bought by the Railroad Company in Indiana, as above stated, were transported and delivered by the Railroad Company to that treatment plant. Respondent did not pay the freight for that transportation and the circumstance that the billing was in its name as consignor is not of consequence in the light of the facts showing the completed delivery to the Railroad Company in Indiana. See *Superior Oil Co. v. Mississippi*, 280 U. S. 390."

These statements apply equally to the Class D sales herein and this case is clear authority for the taxation of these sales. The recent case of *Trotwood Trailers, Inc. v. Evatt* (Ohio, 1943), 51 N. E. (2d) 645, had under consideration a similar problem in the application of the Ohio sales tax to those sales of automobile trailers where the buyer came into Ohio to take delivery. In a well reasoned opinion (in which the court relied heavily upon the *Wood Preserving* case) the tax was upheld.

Other cases to the same effect are: *Superior Oil Co. v. Mississippi* (1929), 280 U. S. 390, 395; *Federal Compress*

Co. v. McLean (1933), 291 U. S. 17; *State Board of Equalization v. Blind-Bull Coal Co.* (1940), 55 Wyo. 438, 101 Pac. (2d) 70; *In re Conecuh Pine Lumber & Manufacturing Co.* (1910), 180 Fed. 249.

Against this established rule appellant cites three cases to each of which may be applied the statement of this court in *Sonneborn Bros. v. Cureton* (1923), 262 U. S. 506, 514, in regard to *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282:

> "But that case was not concerned with the power to tax, but rather with the power of a state to prevent an engagement in interstate commerce within her limits, except by her leave. The holding there was that a contract for the purchase of a crop of grain in Kentucky to be delivered at a railway station in Kentucky for shipment to Tennessee, conformably to a settled course of business, was an interstate contract which a corporation not authorized by Kentucky to do business in that State might nevertheless make and enforce without incurring the penalty of the State law."

In *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, by agreement between the parties, it was understood that interstate commerce was involved, while the contention in this case is not the application of the Gross Income Tax law to interstate commerce, but, first, whether the factual situation indicates that the transactions in question are actually in interstate commerce, or of such a character that a non-discriminatory state tax may be imposed.

Multiplicity of Taxes

Appellants lay particular emphasis upon their claim that, because the course of transactions between appellants

and the ultimate purchaser may be exposed to taxation by different states, any tax on this course of business is invalid.

Only one concrete example of such a possibility is offered by the appellants and that is the amendment of the Illinois Retailer's Occupation Tax Law purporting to tax *selling activities* in that state. Certainly, it must be admitted that, if this law be applied as claimed by appellants, it will increase their cost of doing business. So likewise would a property tax levied upon appellants' goods while a rest at one of its transfer warehouses, *Minnesota v. Blasius* (1933), 290 U. S. 1; or a tax upon its privilege of manufacture measured by sales price. *American Manufacturing Co. v. St. Louis* (1919), 250 U. S. 459. In each instance the tax is levied upon a local incident or activity separate and distinct from the interstate commerce involved. Here the tax is by its terms levied upon intrastate activities alone.

> "The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax upon its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere."
>
> *Southern Pacific Co. v. Gallagher* (1939), 306 U. S. 167.

It has heretofore been shown that the Indiana Gross Income Tax *as to non-residents* is levied against local activities engaged in by appellants under the protection of the laws of Indiana and for which the State now asks

payment. Because appellants' business organization assigns territories without regard to state boundaries, they ask to be relieved of all payment for these non-discriminating charges levied with mathematical equality upon intrastate commerce and interstate commerce alike.

II

THE TAX ON CLASS C SALES IS NOT AN UNCONSTITUTIONAL BURDEN UPON INTERSTATE COMMERCE

This class of sales is identical with Class D sales except that the buyer resided in Indiana and the appellants' branch was located out of state. An executory contract of sale, consummated by appellants' acceptance outside the state and calling for the sale of unascertained goods, was fully performed within the state by the delivery there of ascertained goods, *i. e.,* the particular truck sold. The goods themselves did not at any time move in Interstate commerce, but were conveyed by the purchaser to another point in Indiana.

Thus the only possible interstate or extrastate activity was the formation of the executory contract of sale. Upon these facts Class C sales fall directly within the rule stated in *Western Live Stock v. Bureau of Revenue* (1938), 303 U. S. 250, where the Court said (p. 253):

> "That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question."

Furthermore, the sole cause of the extrastate element was the Appellants' departmentalization of its business whereby certain Indiana counties were assigned to out-of-state branches. *Cf. Nelson v. Sears, Roebuck & Co.* (1941), 312 U. S. 359. We may here interpolate that the appellee admits that such departmentalization was based upon sound economic factors and was not for the purpose of tax evasion. This was also true in the *Sears Roebuck* case.

The cases involving the taxation of the instrumentalities of Interstate Commerce being all of those cited by appellants on page 31 of their brief, evidence a development of law peculiar to that field and are not to be extended beyond that field. *Lockhart, Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harvard Law Review, 40 (Oct. 1943). The cases involving selling activities, herein cited, have so developed the law in that field that it is unnecessary and unprofitable to incumber their import with a comparison of decisions relating to a separate and distinct application of the commerce clause.

J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307, has previously been distinguished. (*Supra*, pp. 13 and 17.)

III

THE TAX ON CLASS E SALES WAS NOT AN UNCONSTITUTIONAL BURDEN UPON INTERSTATE COMMERCE

In Class E sales appellants' branch was actively engaged in business in Indiana in the selling of goods to Indiana customers. The only interstate element was that in the performance of the Indiana contract of sale the

goods were shipped from an out-of-state factory, warehouse or branch direct to the customer. The customer paid the freight and no tax was levied upon the cost of transporting the goods across the state lines.

Appellants rely upon *Sonneborn Bros. v. Cureton* (1923), 262 U. S. 506 (a case of foreign export), and attempts to distinguish *Wiloil Corporation v. Pennsylvania* (1935), 294 U. S. 169, upon the basis that the contract did not there require interstate shipment, while in the case at bar interstate shipment was directed by the purchaser. Since the above decisions this court affirmed the decision in *Graybar Electric Co. v. Curry* (1939), 238 Ala. 116, 189 So. 186, *Aff'd* 308 U. S. 513, wherein the Class A sales were made upon a contract specifically requiring that the goods be shipped in interstate commerce.

In *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 53-55, the contention here advanced by appellants was examined at length and specifically rejected. In *McGoldrick v. DuGrenier, Inc.* (1940), 309 U. S. 70, the statement of facts discloses that the goods were shipped in interstate commerce direct to the purchaser.

As heretofore shown, this tax is levied upon appellants' intrastate activities. These consisted of maintaining a branch of its business where a stock of goods was kept (Record, pp. 61-62) and where orders are solicited and accepted and payments received (Record, p. 33, par. 26). In other words, it was a general intrastate business. Class E sales arose when orders were for large amounts of goods which could not economically be carried in stock and where a cheaper freight rate could be obtained by direct shipment. Such sales were in furtherance of and incidental to this intrastate business against which the tax was levied.

The transactions were in all respects similar to those in *Graybar Electric Co. v. Curry* (1938), 238 Ala. 116, 189 So. 186, *supra,* and are equally taxable. It has not yet been held that the parties may by their contract render that non-taxable which would otherwise be taxable.

IV

THE TAX DOES NOT CONTRAVENE THE DUE PROCESS CLAUSE

Appellants do not extensively argue their contention that the tax as here laid is upon extrastate activities in violation of the due process clause of the United States Constitution. Nor will the appellee indulge in a vain parade of the many authorities directly holding that where the activity taxed occurs even partially within the state, jurisdiction to tax is established under this provision of the Constitution. *Cf. Department of Treasury v. Wood Preserving Corp.* (1941), 313 U. S. 62; *Department of Treasury v. Ingram-Richardson Manufacturing Co.* (1941), 313 U. S. 252; *State Tax Commission v. Aldrich* (1942), 316 U. S. 174.

This tax is measured by the volume of such activities as expressed in the gross receipts arising from them within the state. It does not attempt to reach out of the state for such measure as was the case in *Hans Rees Sons v. North Carolina* (1931), 283 U. S. 123, cited by appellants.

CONCLUSION

The tax, as levied against non-residents of the state, is conditioned upon their intrastate activities and measured by the receipts therefrom. All of the receipts here involved arose from sales upon the Indiana market. In Class D the purchasers elected to come to that market to obtain their goods at less cost. In Classes C and E the purchasers were residents of the state and deliveries were made in Indiana at the Indiana cost. The theme of the whole act is that of equality and no distinction is made between intrastate and interstate commerce.

In Classes C and D appellant engaged in no interstate commerce and the sale taxed was completed before the interstate shipment began. In Class E the decisions of this court establish that the interstate movement was merely incidental and the tax does not constitute a burden upon it.

The judgment of the Supreme Court of Indiana should be affirmed.

Respectfully submitted,

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